

G29KSEEM

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 BofI FEDERAL BANK, A Federal  
4 Savings Bank,

Plaintiff,

5 v.

16 MC 25 (JPO)

6 SEEKING ALPHA, INC.,,

7 Defendant.

8 -----x

9 New York, N.Y.  
10 February 9, 2016  
11 11:45 a.m.

Before:

12 HON. J. PAUL OETKEN,

13 District Judge

14 APPEARANCES

15 SHEPPARD MULLIN RICHTER & HAMPTON LLP

Attorneys for Plaintiff

16 BY: THOMAS KcKEE MONAHAN

17 MILLER KORZENIK SOMMERS LLP

Attorneys for Defendant

18 BY: DAVID S. KORZENIK

TERENCE PATRICK KEEGAN

G29KSEEM

1 THE DEPUTY CLERK: Your Honor, this is in the matter  
2 of BofI Federal Bank versus Seeking Alpha, Inc.

3 Starting with plaintiff's counsel, can I have all  
4 counsel state their appearance for the record, please.

5 MR. MONAHAN: This is Thomas Monahan, Sheppard Mullin  
6 Richter & Hampton, for petitioner, BofI Federal Bank.

7 THE COURT: Good morning.

8 MR. KEEGAN: Terence Keegan, with Miller Korzenik  
9 Sommers, on behalf of respondent, Seeking Alpha, Incorporated.

10 MR. KORZENIK: And David Korzenik, on behalf of  
11 Seeking Alpha.

12 THE COURT: Good morning.

13 Gentlemen, this is another miscellaneous matter, 16  
14 Misc. 25, and this is a motion to compel compliance with  
15 subpoenas, Docket No. 1, and a cross-motion to quash those  
16 subpoenas, which is Docket No. 11, on ECF.

17 The initial movant is Mr. Monahan on behalf -- is it  
18 BofI? Is that how you say it?

19 MR. MONAHAN: It is, your Honor.

20 THE COURT: I've read all the papers, and I did get a  
21 chance to read the reply papers that came in, I think,  
22 yesterday, so I think I've read everything.

23 And I will turn it over to you first, Mr. Monahan, to  
24 highlight anything you'd like.

25 MR. MONAHAN: Yes, your Honor. I won't belabor the

G29KSEEM

1 facts too much since they're set forth in our papers, but as  
2 your Honor is aware, my colleagues at Sheppard Mullin in  
3 Los Angeles and San Diego have an action pending before your  
4 Honor's colleague, Judge Cynthia Bashant, in the Southern  
5 District of California. That underlying action is an action by  
6 BofI against their former employee, Charles Matthew Erhart.  
7 That complaint relates to Mr. Erhart's theft of confidential  
8 and proprietary information from BofI, and many of those claims  
9 relate to an unfounded whistleblower action that Mr. Erhart  
10 filed in the Southern District of California and also was  
11 pending before Judge Bashant.

12 THE COURT: It is currently pending?

13 MR. MONAHAN: Yes, your Honor.

14 THE COURT: When you say "unfounded," that's your  
15 view? No court has said that, right?

16 MR. MONAHAN: Correct, your Honor.

17 THE COURT: Okay.

18 MR. MONAHAN: But that whistleblower complaint was  
19 sealed, and the proceedings were confidential until Mr. Erhart  
20 leaked those proceedings and leaked his complaint to the New  
21 York Times.

22 The action against Mr. Erhart by BofI has been found  
23 to be meritorious. Indeed, BofI has made out a prima facie  
24 case which becomes relevant in the context of the law here. In  
25 fact, Judge Bashant has issued a temporary restraining order

G29KSEEM

1 prohibiting Mr. Erhart from distributing any further  
2 confidential information and requiring him to return all the  
3 confidential information that he stole.

4 THE COURT: But I understand from the other counsel,  
5 that that was on consent.

6 MR. MONAHAN: I was going to get to that.

7 Yes, your Honor, it is a consented TRO, which I think  
8 supports even further that there is no dispute here that  
9 Mr. Erhart has taken confidential information from BofI, that  
10 he has distributed it, and that he has to return it to BofI.  
11 Even Mr. Erhart is not disputing that.

12 In fact, Judge Bashant has authorized BofI to serve  
13 third-party subpoenas in order to determine whether persons  
14 other than Mr. Erhart have accessed or received the  
15 confidential information that Mr. Erhart took from BofI.

16 THE COURT: Can you tell me about the whistleblower --  
17 when was the whistleblower complaint filed, and when was it  
18 unsealed?

19 MR. MONAHAN: It was filed in early October, and,  
20 quite frankly, your Honor, I'm not sure if it is unsealed at  
21 this point or not, but, obviously, the complaint was shared  
22 with the New York Times, so the contents of the complaint have  
23 been publicly disseminated.

24 THE COURT: But it was filed initially under seal?

25 MR. MONAHAN: It was.

G29KSEEM

1 THE COURT: By Mr. Erhart?

2 MR. MONAHAN: By Mr. Erhart.

3 THE COURT: Okay. Do you agree that the Sony  
4 standard, the five-part standard, is the governing standard in  
5 this situation?

6 MR. MONAHAN: I do, your Honor. And I think there is  
7 no dispute here between the parties that this is the standard  
8 that governs.

9 THE COURT: Now, in Sony itself, and I think in Arista  
10 records, they're talking about a situation where content owners  
11 are going after potential copyright infringers, and in that  
12 case, Judge Chin, and then the Second Circuit, said there's a  
13 First Amendment interest in the people doing the downloading,  
14 and file-sharing, and all that, although it's somewhat of a  
15 weak interest and has limits. Here you have people doing real  
16 speech. I mean, here you have the anonymous posting is not  
17 something weak or sketchy, it's real, it's articles arguably of  
18 public concern, public interest.

19 MR. MONAHAN: Well, your Honor, I would take a  
20 different approach to the speech. This is not political speech  
21 or fundamental First Amendment speech, this is commercial  
22 speech.

23 THE COURT: Why do you think it's commercial speech?

24 MR. MONAHAN: Well, because the two anonymous posters  
25 both have short positions in BofI, and are advocating against

G29KSEEM

1 the stock in BofI, and advocating -- they're essentially  
2 advocating in favor of their commercial position, which is that  
3 BofI, the value of the stock is inflated, and that more people  
4 should be on my side with that. The very --

5 THE COURT: But --

6 MR. MONAHAN: The dissemination of these articles  
7 benefits that position.

8 THE COURT: Right. So that you think they're just  
9 proposing a transaction as opposed to saying what is kind of  
10 normatively better for people to do in their interests?

11 MR. MONAHAN: Correct. I think they're proposing that  
12 other people get in on this, get in on their short selling  
13 position, because the sentiment and that fact helps them.

14 THE COURT: In any event, the five-part standard is  
15 what it is irrespective of whether it's commercial speech, or  
16 downloading speech, or whatever.

17 MR. MONAHAN: I agree, your Honor.

18 In addition to the five-part standard, we just point,  
19 your Honor or, I guess, respondents have pointed out the Doe v.  
20 2themart test that the District of Washington has adopted.  
21 That's also been adopted in the Western District of Missouri  
22 and the Middle District of Pennsylvania, and that seems to be a  
23 lesser test. As I believe we have satisfied the five-part test  
24 in Arista, I mean, the question is whether plaintiff  
25 established a prima facie claim of actual harm. Clearly BofI

G29KSEEM

1 has done that here. We clearly have actionable claims against  
2 Mr. Erhart.

3 THE COURT: Let me focus you on that, because it's the  
4 first prong that I think is the most -- maybe in some ways, the  
5 most salient here, which is the concreteness of plaintiff's  
6 showing of a prima facie case of actionable harm.

7 Now, the articles here talk about information. They  
8 disclaim the use of sources from Mr. Erhart. I mean, they  
9 disclaim having communicated at all with Mr. Erhart, and then  
10 they proceed to sort of essentially, I think, talk about the  
11 complaint, which is one reason I was asking whether it had been  
12 unsealed, because if it's something you can get on the docket,  
13 then it's actually just public information.

14 MR. MONAHAN: Well, it's the complaint and the New  
15 York Times article. Additionally, your Honor, these are very  
16 self-serving statements by the authors, and in some  
17 instances -- and they're block-quoted in respondent's brief on  
18 pages 13 through 15 -- in some instances, these read like they  
19 were drafted by a lawyer and are clearly just sort of --  
20 they're covering for themselves here to potentially avoid  
21 having to sit down at a deposition and say whether or not they  
22 have spoken with Mr. Erhart.

23 THE COURT: But is there anything in any of the  
24 articles that is not part of a public filing in the case or  
25 something from the New York Times article?

G29KSEEM

1 MR. MONAHAN: We have not identified anything, but --

2 THE COURT: So, what reason is there to think that  
3 it's from some sort of separate communication from Erhart?

4 MR. MONAHAN: Well, there's a difference between a  
5 filing and an article and Erhart perhaps contacting these  
6 people and directing them to a specific filing in an article or  
7 directing them to a filing in a case and saying, you know, go  
8 here, go here, putting all these pieces together.

9 THE COURT: Would that be within the TRO if he called  
10 them and said, oh, look on PACER, there's a filing, and if you  
11 look at this, and it's totally public, he's just pointing them  
12 to something that's public, would that then be within the TRO's  
13 reference to confidential information if it's public?

14 MR. MONAHAN: I think it would if he is pointing out  
15 where confidential information has been disclosed in the past  
16 and essentially providing a roadmap. I think that would  
17 clearly violate the TRO.

18 In any event, even if these posters show up and say,  
19 you know, here's where I got this information from, it was all  
20 the New York Times or it was all these public filings, that  
21 goes directly to damages in BofI's claim, because BofI's claim  
22 for damages is based on Erhart's leak to the New York Times and  
23 the dissemination of that information more broadly, including  
24 on financial blogs such as Seeking Alpha.

25 THE COURT: But if you're trying to find out the harm



G29KSEEM

1 from that, you now know, as a matter of public record, what has  
2 been put on the blog, so I guess all you could do from that is  
3 talk to an expert about how many people read Seeking Alpha and  
4 then do some extrapolation of damages. How does knowing who  
5 wrote the blog posts provide any more information that would  
6 help with damages?

7 MR. MONAHAN: Because it doesn't go to the source  
8 material as to where these sources came from, because --

9 THE COURT: Either way, your theory is that it's all  
10 derivative of his improper leaks.

11 MR. MONAHAN: It is all derivative of his improper  
12 leaks, but I have to prove that. My colleagues in California  
13 have to prove that this is derivative of his improper leaks,  
14 and if this is somehow pieced together from public information,  
15 SEC filings, other filings, we need to be able to establish --  
16 you need to prove causation in order to get to that damages  
17 point. I agree that damages would be a part of expert  
18 testimony, but where the information comes from is vitally  
19 important to causation and to --

20 THE COURT: But the articles say, according to a  
21 lawsuit and according to the New York Times, et cetera. So, we  
22 all know it came from his lawsuit and his -- you say his leak  
23 to the New York Times. So, what else do you have to prove?

24 MR. MONAHAN: Well, you have to authenticate that  
25 that's actually the case. All you have is an anonymous article

G29KSEEM

1 and no ability to actually put that into evidence. I don't  
2 think that the article comes into evidence in a proceeding  
3 before the Southern District of California. The article is  
4 hearsay, and there's really no basis for us to get that article  
5 in absent this testimony.

6 I think the other --

7 THE COURT: I'm not sure -- actually, I don't want to  
8 make your argument for you, but I'm not sure it would be  
9 hearsay because I don't think it would be for the truth of the  
10 matters asserted.

11 MR. MONAHAN: Well, it would be for the truth as to  
12 where the sources -- as to what those sources were.

13 THE COURT: Okay.

14 MR. MONAHAN: I mean, you need to prove where the  
15 evidence came from in order to establish the causal link, and  
16 that would be what we seek to do if the self-serving comments  
17 and the self-serving statements in these articles prove true,  
18 and these folks haven't spoken to Mr. Erhart or aren't, in  
19 fact, Mr. Erhart himself or someone acting on his behalf.

20 I think another important issue here is, we have  
21 provided notice to the anonymous poster, Aurelius, of these  
22 proceedings here today. After we filed this action in the  
23 comments section on Aurelius' article, we posted a notice --

24 THE COURT: Aurelius is A-u-r-e-l-i-u-s?

25 MR. MONAHAN: Like Marcus Aurelius, I think.

G29KSEEM

1 THE COURT: Exactly.

2 MR. MONAHAN: We posted a comment on his article.

3 Both Aurelius and the other anonymous speaker, who is -- I'm  
4 sorry, who's Real Talk Investments is the pseudonym there, we  
5 attempted to post a notification on those comments saying that  
6 these proceedings were happening in Part I on this date and  
7 here's the index number.

8 In Exhibit F and Exhibit G to Mr. Marino's  
9 declaration, in those comments, you can see that Aurelius and  
10 Real Talk Investments are active in responding to the posts on  
11 their articles. So, the Aurelius one was actually posted.  
12 Apparently, any posts you make on a blog at Seeking Alpha have  
13 to be approved by moderators. Our post for Aurelius was  
14 posted. The one to Real Talk Investments, Seeking Alpha, I  
15 guess, did not see fit to post that on Real Talk Investments'  
16 page. But Aurelius has been given notice of these proceedings.  
17 Aurelius has not objected, has not contacted my office, has not  
18 contacted anyone, as far as I'm aware, to say they object to  
19 being identified for the limited purpose that we've asked here.

20 We've attempted to do the same with respect to Real  
21 Talk Investments and have been stymied by Seeking Alpha, and I  
22 think that Seeking Alpha lacks standing to raise the First  
23 Amendment issues that they're raising here. The First  
24 Amendment issues at issue here, the anonymity, does not belong  
25 to Seeking Alpha and is not Seeking Alpha's to raise.

G29KSEEM

1 THE COURT: You didn't argue this in your papers, did  
2 you?

3 MR. MONAHAN: We did in our reply papers. We cite to  
4 Chevron Corp. v. Donziger, which is a Northern District case.  
5 It's 2013 WL 3228753.

6 And with that, your Honor, I would just run down the  
7 specificity of the requests. If Seeking Alpha attempts to make  
8 the argument that we're seeking -- that the subpoena is broader  
9 than it is, we have, in meet-and-confers, said, listen, all we  
10 want, we don't want any bank information or whatever other  
11 information, we just want a name and an address, we want to be  
12 able to ask these people questions and depose them under oath,  
13 particularly with respect to those self-serving comments and  
14 where they're getting the confidential information that's  
15 contained in your articles.

16 The absence of an alternative means we've attempted to  
17 contact Aurelius and Real Talk through the comments. Seeking  
18 Alpha has inhibited us from contacting Real Talk. We've posted  
19 on Aurelius. There's been no response as of last night on the  
20 post, and we've received no comments either.

21 If Mr. Erhart is directing these folks, he's not going  
22 to disclose that, either, in discovery in our action, and  
23 that's that.

24 And, again, the central need for these subpoenaed  
25 materials, they go directly to causation, they go directly to

G29KSEEM

1 damages, and I think the expectation of privacy is rather low  
2 here, actually, your Honor. The policies posted on Seeking  
3 Alpha's website with respect to anonymity make very clear that  
4 these parties are subject to subpoena, that process and court  
5 orders, including investigations by the SEC, Seeking Alpha may  
6 be required to respond to, and they do, in fact, provide their  
7 contact information, and according to Seeking Alpha in their  
8 papers, apparently a lot of additional financial and other  
9 sensitive information to Seeking Alpha. They, in turning that  
10 over, have given notice their expectation that if there is a  
11 proceeding like this one, their identities may be disclosed.

12 THE COURT: Okay. I think that answers my questions.

13 MR. MONAHAN: Thank you, your Honor.

14 THE COURT: Thank you, sir.

15 I'll hear from Mr. Keegan or Mr. Korzenik.

16 MR. KEEGAN: Your Honor, good morning. Terence  
17 Keegan, for Seeking Alpha.

18 THE COURT: Good morning.

19 MR. KEEGAN: I'd like to touch on a number of  
20 misstatements that counsel made.

21 First, as your Honor correctly noted, this is an  
22 anonymous speech case, and that's why the Arista and Sony  
23 standard applies here.

24 As to the standing issue that was just touched upon,  
25 that position is not true in the Dendrite line of cases that

G29KSEEM

1 you've seen over the past decade or so, not true in any of the  
2 First Amendment cases that Seeking Alpha has been a respondent  
3 to.

4 THE COURT: So, they have been able to assert the  
5 anonymous poster's First Amendment rights essentially?

6 MR. KEEGAN: That's correct. The NanoViricides case,  
7 which I believe was from a year or two ago, in state court, one  
8 of the most recent matters in which Seeking Alpha  
9 successfully --

10 THE COURT: That was in New York Supreme?

11 MR. KEEGAN: That's right.

12 THE COURT: Do you know which justice?

13 MR. KEEGAN: Justice Kern, if I remember correctly.

14 -- in which she denied the request for preaction  
15 disclosure from Seeking Alpha.

16 But it goes back even further, the Deer Consumer  
17 Products case from 2011 in which Seeking Alpha did not have to  
18 give up any information as to the anonymous author. I think  
19 what the Deer case particularly shows, and this is in your  
20 papers as well, is just how serious this First Amendment issue  
21 is and how serious it is for Seeking Alpha. This is Seeking  
22 Alpha's business. This is a relationship with its authors who  
23 choose to have a pseudonym, and it's a relationship with the  
24 audience who trusts the editorial integrity of this information  
25 and the quality on which they can review all of this

G29KSEEM

1 information and make investment decisions.

2 That leads me to speak about the so-called commercial  
3 speech that is in the BofI's reply. This speech does not  
4 propose a commercial transaction at all. Both of the authors  
5 disclose that they have a short position in the BofI stock.  
6 They do not represent that they have closed any trades on BofI,  
7 they do not propose that the readers take a short position.  
8 They merely bring this information to light, and it plays in to  
9 what Seeking Alpha is about. It's boosters of a stock, critics  
10 of a company, and that the tagline on Seeking Alpha's home  
11 page, which is also in our papers, is read, decide, invest.  
12 And that's what the readers do, they take pro positions, they  
13 take positions against, and they make up their own mind.

14 And the articles, and which your Honor noted, all  
15 point to the publicly available sources from which they receive  
16 the information. This is where I got this, links to the  
17 material. So, everything is disclosed. And these are the  
18 judgments that the individual authors made from it.

19 THE COURT: I'm with you on the fact that the --  
20 there's really no indication that the articles are based on  
21 anything other than information that has been made public, but  
22 I'd like you to address the idea that they need -- for damages  
23 purposes in their case, I guess, in California, they need to  
24 get the exact source, so they can connect the dots and prove  
25 causation for purposes of damages and so forth.

G29KSEEM

1 MR. KEEGAN: Sure. To that point -- and I think this  
2 also goes to within the Arista and Sony factors, the central  
3 need for the information. You heard counsel talk about the  
4 suggestion that Mr. Erhart is, quote, directing these authors.  
5 There is nothing in the facts in this case to support that  
6 accusation.

7 What there is, is right from, I believe, a day or two  
8 after the New York Times article and a day or so after, there  
9 was a drop in the BofI stock in mid-October. You have BofI's  
10 chief executive in a conference call with analysts, a publicly  
11 disclosed conference call, "By the time we are done, we will  
12 find a coordinated effort with the media, with short sellers,  
13 and with Mr. Erhart to provide a variety of material nonpublic  
14 information."

15 So, this conspiracy theory that has been -- it's been  
16 part of BofI's so-called investigation from the start, but  
17 that's not part of their lawsuit. Their lawsuit is about  
18 Mr. Erhart's alleged disclosure of confidential information.  
19 The authors fully disclose where they received their materials  
20 from. There was nothing to suggest in the articles that they  
21 spoke with Mr. Erhart, just as their disclosures say, and they  
22 may be carefully worded, but they're thoroughly worded to try  
23 to ward off this very sort of attempt by BofI, which, from the  
24 start, has been the chief executive's directive.

25 THE COURT: What about the idea, though, that they



G29KSEEM

1 need it for sort of damages in the claims that they have  
2 asserted? In other words, the idea that we need to connect the  
3 dots as to causation as to how this information got where and  
4 to this blog so we can connect it all back to Mr. Erhart?

5 MR. KEEGAN: Sure. I think that that's an attenuated  
6 claim by BofI. It also goes to the factor within the Arista,  
7 Sony decisions as to the availability of alternative sources.

8 Now, Mr. Erhart is available to deposition by BofI.  
9 We have nothing before us that BofI has asked Mr. Erhart who  
10 else did you disclose this to, did you disclose information to  
11 Seeking Alpha, are you in contact with Seeking Alpha authors.  
12 Nothing to suggest that BofI has ever shown Mr. Erhart the  
13 articles that are at issue in these subpoenas. What they do  
14 say is that it's not rational -- I think I'm using the words  
15 from their reply -- to think that Mr. Erhart would give a  
16 straight answer, an answer under oath, which is not rational.

17 But to the point, they haven't taken that step and --  
18 before subpoenaing Seeking Alpha for any and all identifying  
19 information as to these authors and posters.

20 That's another thing that I wanted to correct: In the  
21 reply, we see that BofI is only seeking for a single page of  
22 information, just the name, address, and telephone number. But  
23 I'd like to hand up a copy of the actual requests, so that I  
24 can read them.

25 THE COURT: Yes, I have it. You mean the actual

G29KSEEM

1 subpoena?

2 MR. KEEGAN: The actual subpoena, yes.

3 THE COURT: Yes, I have it.

4 MR. KEEGAN: Question number 1: Any and all records  
5 and documents regarding the identification of persons who  
6 posted the articles."

7 Request number 2: Any and all records and documents  
8 regarding the identification of the person or persons  
9 identified as Real Talk Investments.

10 Request number 3: Any and all records and documents  
11 regarding the identification of the person or persons who  
12 posted the articles.

13 And finally, request number 4: Any and all records  
14 and documents regarding the identification of the person or  
15 persons identified as Aurelius.

16 THE COURT: Well, couldn't we treat that -- yes, you  
17 could argue that any and all records regarding the  
18 identification could be construed paroled, but they've now said  
19 all we want is name and address, so shouldn't I treat that as  
20 effectively the request?

21 MR. KEEGAN: Well, even if your Honor did, we think  
22 that's improper and totally inappropriate here. We asserted  
23 the objection on the First Amendment, on the factors of the  
24 Arista and Sony cases from the start. And it goes to Seeking  
25 Alpha's policy as stated, as I think mischaracterized by

G29KSEEM

1 counsel, that Seeking Alpha would give up this information and  
2 that authors are to have a minimal privacy expectation from the  
3 website.

4 We've defended requests like this, demands for this  
5 information for years going back to the Deer case in 2011 and  
6 through to the present. We're in state court now with another  
7 editor in which the plaintiff in that case actually does  
8 request the name, address, and telephone number of an author,  
9 and we oppose that as improper there, and we oppose it as  
10 improper here. There was no basis to break the author's First  
11 Amendment privilege, Seeking Alpha's First Amendment privilege  
12 of this material, where there is such an absence of a prima  
13 facie showing of actionable harm, such an absence of a central  
14 need for the information here, such a lack of exhausting the  
15 effort of clearly alternative means of obtaining this  
16 information.

17 That's the other thing that I wanted to point out:  
18 They said that they had submitted a notice for comments on  
19 Seeking Alpha. I understand from our client that the notice  
20 from Real Talk Investments has been restored to the site, that  
21 it was a technical issue. It certainly was not us instructing  
22 Seeking Alpha not to put it up, part of the sort of wild  
23 accusation to vilify not only our client, but us.

24 But what they do acknowledge in their reply is that  
25 the comments have to go through a moderator, and when we were

G29KSEEM

1 on the phone with BofI counsel, my colleague, Ms. Sommers,  
2 suggested and others have directly contacted the authors of the  
3 articles -- of other articles through Seeking Alpha right on  
4 the article page underneath the author's name, send message.  
5 You send a direct message to the author. There's another way  
6 of doing it through Seeking Alpha through the author profile,  
7 you send a direct message. They have not attempted to do that.  
8 And if they couldn't see that on the Seeking Alpha pages for  
9 themselves, they've seen it in our papers. They have had our  
10 papers for a week, they have not attempted to do that.

11 Just to reiterate one thing that counsel did say in  
12 response to your Honor's question: They have not identified  
13 anything in terms of confidential information that came from  
14 the underlying case and that appears in the Seeking Alpha  
15 articles, that appears in the articles at issue.

16 THE COURT: Let me just ask you if you know the answer  
17 to the question when the complaint, the whistleblower  
18 complaint, was unsealed?

19 MR. KEEGAN: I would have to check, your Honor.

20 THE COURT: Okay. Do you know if it's available now  
21 on PACER or publicly?

22 MR. KEEGAN: I do believe it is.

23 THE COURT: Okay.

24 MR. KEEGAN: I do believe that all these materials are  
25 public, but, again, that's my understanding, but I would have

G29KSEEM

1 to check.

2 THE COURT: Okay. Thank you, Mr. Keegan.

3 MR. KEEGAN: Okay.

4 THE COURT: Is there anything you'd like to reply to  
5 Mr. Monahan?

6 MR. MONAHAN: I have a few things to reply to. I  
7 mean, the question is not whether the records are unsealed as  
8 of today, the question is were the records unsealed when  
9 Aurelius and Real Talk Investments posted their article.

10 To the point of this not being commercial speech and  
11 not proposing transactions, Real Talk Investments has not  
12 posted a single article other than articles about BofI. Real  
13 Talk Investments did not become a contributor to Seeking Alpha  
14 until after Mr. Erhart leaked his complaint to the New York  
15 Times, and Real Talk Investments does not appear to write on  
16 anything other than Seeking Alpha and the short sale that he or  
17 she stands to profit by and encouraging the short sale.

18 To the state court actions that they point out that  
19 Seeking Alpha has apparently been successful in protecting this  
20 First Amendment right that they claim they may do so on behalf  
21 of third parties, in the Deer Consumer Products case, that  
22 third party, the nonparty, was ultimately unmasked by the court  
23 and actually ends up as a party to that litigation in the state  
24 court. Seeking Alpha was subject to defamation and libel  
25 claims by the plaintiff in the Dear Consumer Products action

G29KSEEM

1 and were dismissed from the action, but the case proceeded  
2 against the anonymous party, and, ultimately, the anonymous  
3 party was -- the identity was unveiled.

4 So, the idea that these state court claims should  
5 override the Chevron case, the federal standard, that they  
6 don't have standing here, I think, should be rejected.

7 The point that the subpoena is somehow overbroad  
8 completely undermines the meet-and-confer process between my  
9 colleagues in Los Angeles and my brother at the bar's here,  
10 Ms. Sommers, back at their offices. During those  
11 conversations -- and it's very clear in Mr. Marino's  
12 declaration -- we have made clear that all we want is the  
13 identifying information sufficient to identify these authors,  
14 find out their sources, and find out whether they have ever had  
15 communication with Mr. Erhart. We've made that clear from the  
16 moment we began meeting and conferring with them on this, and  
17 that's just not the case.

18 And with the notice issue, with the claim technical  
19 issue, this is just a symptom of what we have been encountering  
20 with -- and I certainly don't impugn counsel for it -- but with  
21 Seeking Alpha themselves. We attempted to serve the subpoenas  
22 on Seeking Alpha multiple times. Every time our process server  
23 went there, she spoke with someone at Seeking Alpha upstairs --  
24 the security guard spoke with someone upstairs, and he was  
25 denied access to the premises.

G29KSEEM

1           The declaration from Mr. Hoffman has no probative  
2 value whatsoever because Mr. Hoffman is located in Israel. It  
3 appears that Mr. Hoffman's executive page that showed that he  
4 was located in Israel was removed from the Seeking Alpha  
5 website. It's no longer accessible until we find it deeply  
6 embedded somewhere in their website. They clearly are trying  
7 to frustrate this beyond the judicial process, beyond the  
8 Court, and claiming now that the posts for Real Talk  
9 Investments was a technical glitch, I think, just is  
10 disingenuous in this context.

11           And with that, your Honor, I'd request that our motion  
12 be granted.

13           THE COURT: Okay. Thank you.

14           MR. KEEGAN: Your Honor, just to quickly respond.  
15 Regarding Mr. Hoffman, Mr. Hoffman executed his declaration in  
16 New York while he was here. This allegation of scrubbing is  
17 just wild. Mr. Hoffman has submitted declarations and  
18 affirmations, affidavits, in a number of these sorts of other  
19 cases. It is clear that we have defended -- resisted subpoena  
20 attempts like this before many times. There is just no basis  
21 for saying that Seeking Alpha is attempting to avoid service,  
22 which is clear in our papers.

23           As to the declarations from the two process servers,  
24 which BofI, save for its reply, to sort of shape the facts of  
25 what that was allegedly about, speaking with a security guard

G29KSEEM

1 in Seeking Alpha's building as to who has accepted it and who  
2 is authorized to accept service of process, has no weight, and  
3 in any event, this is Thanksgiving week where they receive  
4 confirmation that executives from Seeking Alpha, that the  
5 office itself is closed. So, I think that all goes by the  
6 wayside. In any event, this is ultimately a sideshow, just  
7 getting us away from the key issues here.

8 My colleague, Mr. Korzenik, would like to just comment  
9 on one thing about the Deer case.

10 MR. KORZENIK: Thank you, your Honor.

11 THE COURT: Yes.

12 MR. KORZENIK: Just a minor -- a minor, but important  
13 point regarding the Deer case. Yesterday, out in supreme  
14 New York, Westchester, we were arguing that my adversary made  
15 the very same argument about Deer, that the plaintiff had, in  
16 fact -- the anonymous poster indeed had been disclosed.  
17 Something very special about that: We were not required to  
18 disclose the identity of that anonymous poster. That poster  
19 appeared in the action because he was named as a Doe, and he  
20 decided to defend himself on a jurisdictional basis and wanted  
21 to do so on an anonymous basis. The court said, well, if you  
22 want to appear here, and you want to defend yourself on a  
23 jurisdictional basis, then you must tell us who you are and  
24 where you are. But we were not compelled to disclose. In  
25 fact, the Court made clear we did not have to disclose the



G29KSEEM

1 identity.

2 I'll make a closing point that is instructive to us in  
3 terms of why we wield the anonymous speech right and take it so  
4 seriously. In the Deer case, the Deer company, it's a Chinese  
5 company that was listed on the U.S. security -- in the United  
6 States securities NASDAQ. Alfred Little, the anonymous poster,  
7 that was his pseudonym, had written an article saying I'm a  
8 short seller, I'm a short, and these guys are running a  
9 fraudulent company. I've watched them closely, he had people  
10 watching their factories to see whether the trucks coming in  
11 and out were actually delivering the quantity of goods that  
12 they claimed in public filings. They were not. And he put  
13 that stuff onto our website. He wanted to be anonymous. We  
14 stood by that anonymity, and we believe that that was fair, and  
15 right, and correct.

16 It turned out that, ultimately, he was absolutely  
17 right. Deer was delisted for all of the reasons that he set  
18 forth in his article. And this guy is a very honorable man.  
19 Later, some of the people who helped him investigate this  
20 Chinese company wound up in jail because the company was  
21 connected with the Chinese government or Chinese local  
22 officials. Mr. Little -- I don't remember his real name  
23 because we were gone from the case at that point, I did speak  
24 with his lawyer about this -- went back to do whatever he could  
25 do to get those people out of jail and to let people

G29KSEEM

1 understand, let the authorities know, that they were watched,  
2 that they were supported, that they were protected.

3 So, there's a moral drive behind this, and what we're  
4 really concerned about is that Seeking Alpha constantly gets  
5 these subpoenas to break the anonymity of speakers who are  
6 legitimate speakers, and it's costly stuff, it's costly to  
7 defend, and people bring these subpoenas without the slightest  
8 basis. Confidential information? Never once identified a  
9 single item as confidential. Communications with these  
10 posters? Not a single basis for asserting that. Short seller  
11 conspiracy? Nothing more than an outrageous kind of accusation  
12 and an angry accusation, perhaps, by the CEO that the lawyers  
13 then feel that they have to echo and repeat. But is there any  
14 basis for it? Not a single bit of it.

15 And what I think in the long run, I think what we do  
16 need is some kind of statement from courts -- we've had it  
17 before in Deer and NanoViricides -- that this is an important  
18 right, and that the anonymous speech right is an important one.  
19 We try to wield it responsibly, and we think we've done so  
20 here. We certainly did that in Deer, and we did it in  
21 NanoViricides, and we continue to maintain that struggle as  
22 time goes on.

23 THE COURT: Okay.

24 MR. MONAHAN: Your Honor, just if I may briefly?

25 THE COURT: Yes.

G29KSEEM

1 MR. MONAHAN: This is not the Deer case, this is not  
2 any of the other cases that my colleagues, my brothers at the  
3 bar, are talking about here. This is the case before us here.  
4 I think we've clearly met the standards under Arista. In the  
5 Deer case, there was email service provided by the court by the  
6 Supreme Court here in New York, and Mr. Little was served  
7 through email service. If there's an alternative service that  
8 we can get these posters by to get their depositions, we just  
9 want to examine them under oath as to whether they've had  
10 conversations with Mr. Erhart and what their sources are for  
11 the articles in order to prove our case in the Southern  
12 District of California.

13 THE COURT: Okay. Thank you. I'm prepared to rule.

14 Currently before me is a motion to compel compliance  
15 with subpoenas, and the movant on that is Seeking Alpha, that's  
16 Docket No. 1, and a cross-motion -- I'm sorry, motion to compel  
17 compliance is by BofI Federal Bank, Docket No. 1. The  
18 cross-motion to quash subpoenas is filed by Seeking Alpha, and  
19 that's Docket No. 11.

20 The motion to compel compliance is denied, and the  
21 cross-motion to quash the subpoenas is granted. The parties  
22 agree that the governing standard is Judge Chin's decision in  
23 the Sony Music versus Doe case, which was essentially adopted  
24 in the Arista Records decision of the Second Circuit, and there  
25 are five factors under this. I think there's at least a strong

G29KSEEM

1 First Amendment interest at issue here compared with the case  
2 like with those two cases.

3 First of all, I think, and I conclude, that Seeking  
4 Alpha, under the circumstances, certainly does have First  
5 Amendment interest itself and standing itself because it is the  
6 purveyor of and a forum for commenters, including anonymous  
7 commenters, and it clearly has an interest in allowing that,  
8 not only an interest in avoiding the burden of multiple  
9 subpoenas, but an interest in continuing its business model of  
10 allowing both of those options.

11 Second, I believe that it has the ability, given that  
12 business model, to assert the interests of anonymous posters.  
13 So, I find that there clearly are the First Amendment issues  
14 implicated from the Sony Music factors.

15 Secondly, I find that this does involve core speech,  
16 in fact, core noncommercial speech in a way that is clearly  
17 stronger in terms of what needs to be protected than Sony Music  
18 and Arista cases. There might be elements of commercial speech  
19 here, but I think this clearly involves speech on matters of  
20 public interest as well.

21 In any event, even if it were commercial speech, my  
22 conclusion would be the same, and the conclusion is:  
23 Considering the five factors I've identified, and you've  
24 discussed what they are, so I don't need to repeat them, but  
25 the significant ones here that cause me to rule in favor of

G29KSEEM

1 Seeking Alpha with respect to these subpoenas are: First, the  
2 concreteness of plaintiff's showing of a prima facie claim of  
3 actionable harm, and the fourth one, the central need for the  
4 subpoenaed information to advance the claim.

5 Those are factors one and four, which I think clearly  
6 cut in favor of Seeking Alpha's position on these subpoenas,  
7 and that's because as to the core claim that plaintiff in the  
8 California litigation, that BofI, that is, is asserting, it's  
9 really speculative to suggest that there's information from  
10 these posters and, therefore, held by Seeking Alpha as to their  
11 identity that would really be concretely believed to support  
12 some claim that they have asserted. It's really truly  
13 speculative. In fact, the articles on their face suggest that  
14 the information is obtained from public sources; that is,  
15 public in the sense that the sources were already revealed in a  
16 publicly available filing in court and/or from a New York Times  
17 article.

18 Second, there is a claim about another theory; that  
19 is, a shorting of the stock conspiracy. Again, that is, I  
20 think, speculative in terms of the showing under factor one,  
21 and in terms of the central need for the information, which is  
22 factor four. There's really no plausible basis for concluding  
23 that there is this short conspiracy such that it would overcome  
24 the First Amendment and other interests in protecting the  
25 information.

G29KSEEM

1           Indeed, if there really were a shorting conspiracy as  
2 to the stock, it would be somewhat odd for the posters to  
3 reveal that they're short the stock. If it were truly a  
4 conspiracy, you'd think that they would hide that information.  
5 In any event, I find that it's too attenuated.

6           The final theory that I have been able to identify for  
7 this is the damages theory, which is that as to the claim, we  
8 need to get these identities in order to establish causation  
9 and damages. Again, I find that is much too attenuated, and  
10 that the third factor alternative means to obtain the  
11 information support denial on that ground. I just don't think  
12 that there is enough of a basis to need the information even  
13 for purposes of causation and damages. Again, it is just much  
14 too attenuated.

15           Now, the second factor is specificity of the discovery  
16 request. It's true it's relatively specific, at least as  
17 modified or clarified in the parties' papers, and yet, that  
18 doesn't overcome the other factors.

19           And, finally, there is the fifth factor of the  
20 objecting party's expectation of privacy, and on this, I think  
21 there are arguments you could make on both sides. It's true  
22 that the terms of service apparently of Seeking Alpha do say  
23 that if you post anonymously, this could be subject to a court  
24 order that it be revealed. Nevertheless, I do think there is a  
25 real expectation of privacy both as to the posters of articles

G29KSEEM

1 and as to Seeking Alpha itself because that's part of what it  
2 does, is allow people to post anonymously. So, there is some  
3 expectation of privacy. At the very least, I think the  
4 expectation is that there has to be a very good reason for a  
5 court to order the identity and other information of people who  
6 post revealed, and that certainly has not been met here, in my  
7 view.

8 So, for the reasons stated, I find that an application  
9 of the Sony Music factors and the First Amendment  
10 considerations that underlie those factors call for the  
11 quashing of the subpoena and the denial of the motion to  
12 compel, and that's what the order on the docket will reflect.

13 Is there anything further today?

14 MR. MONAHAN: Not from petitioner, your Honor.

15 MR. KEEGAN: Nothing further, your Honor.

16 THE COURT: Okay. Thank you, gentlemen.

17 (Adjourned)  
18  
19  
20  
21  
22  
23  
24  
25